APPEAL NO. 931023

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). At a contested case hearing held in (city), Texas, on October 12, 1993, the parties agreed that the disputed issues were those framed by the hearing officer, (hearing officer), as follows: 1. Did respondent (claimant) sustain an injury in (month, year); and 2. Does the claimant have disability, and if so, is it related to the alleged injury of (month, year) or to the alleged injury of (date of injury). The hearing officer found that claimant injured her left upper extremity while at work on (date of injury), that she did not have a new injury in (month, year), and that she is presently unable to work. Based on these factual findings, the hearing officer concluded that claimant was injured in the course and scope of her employment on (date of injury), that she did not sustain an injury in the course and scope of her employment in (month, year), and that she has disability as a result of her compensable injury of (date of injury). The appellant (Carrier A) asserts on appeal that the hearing officer erred in finding that claimant did not sustain a separate, new injury to her left thumb in (month, year) due to repetitious physical trauma, erred in finding that claimant's disability is due to her left elbow injury of (date of injury), erred in applying a sole cause analysis to the question of whether claimant sustained a new injury, erred in placing on Carrier A the burden to prove sole cause for the first injury rather than placing it on respondent Texas Workers' Compensation Insurance Fund (Carrier B), and erred in conducting an off-record discussion regarding substantive aspects of the case. The response of Carrier B notes the failure of Carrier A to object at the hearing to the hearing officer's assigning to Carrier A the burden of proving that the claimant's left thumb injury was a new injury sustained in (month, year), and not a part of her (date of injury), injury. Carrier B further asserts that Carrier A failed to make an objection at the hearing to the off-record discussion complained of on appeal. The claimant did not file a response.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions and further finding no reversible error, we affirm.

Carrier A's assertions of error respecting the hearing officer's allocation and application of the burden of proof on the defense of sole cause are without merit. At the outset of the hearing before any evidence was taken, the hearing officer stated that he did not know whether either carrier was raising a sole cause defense but that the burden of proof would be on the party asserting such. No party objected to this statement. The parties then stated their respective positions in opening statements. The claimant's position was that her left thumb injury was a part of her undisputed (date of injury), injury to her left elbow, that it began to hurt again after her elbow surgery in March 1993, and that she did not sustain a new injury in (month, year). Carrier A's position was that while claimant had concededly sustained a specific, accidental injury on (date of injury), she sustained a new repetitious trauma injury to her left thumb in (month, year), and therefore that Carrier B, the employer's workers' compensation carrier in (month, year), had the liability for such injury. Carrier B's position was that claimant did not sustain a new injury in (month,

year), that her current left hand problems were a part of her earlier injury, and therefore that Carrier A, the employer's workers' compensation carrier on (date of injury), had the liability for her injury.

The hearing officer then stated that since claimant was contending she did not sustain a new injury in (month, year), that if Carrier A wished to take the position that claimant did sustain a new injury in (month, year) which was the sole cause of her disability, then Carrier A would have the burden of so proving. The carrier thereafter acknowledged it understood the hearing officer's statement and interposed no objection. The hearing officer had the claimant present her evidence first, obviously recognizing that she had the burden to prove her thumb was injured in the course and scope of her employment notwithstanding that Carrier A was contending she sustained a new injury in (month, year). Claimant had not filed a claim for a new injury in (month, year), although her employer had filed a new Employer's First Report of Injury (TWCC-1). In our view, the hearing officer correctly stated that Carrier A would have the burden of proving that a subsequent injury was the sole cause of claimant's disability and we find no error in either his allocation or application of that burden of proof in this case. *See* Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992.

Claimant testified, through a Spanish language translator, that in (month year), while working as a sewing machine operator sewing panels of materials, she threw a bundle of material up on a high shelf and hurt her left shoulder and arm. She said she worked intermittently thereafter and, in March 1993, underwent surgery on her left elbow. She testified that "when I injured myself I felt the pain all the way down to my hand," that her left thumb was "always hurting from the time of injury," that "it started hurting worse after the surgery," that she received injections for it in March and April 1993, that after she returned to work on May 17, 1993, her thumb pain increased, and that she had to stop work on June 3, 1993, and has since been unable to return to work because of the pain. She also said that (Dr. S), who operated on her left elbow, wants to perform surgery on her thumb and told her her problem was because of the movements. She said she began to see Dr. S in December 1992 and that at his request her duties were changed to using a hot iron to cut compartments for purses, a job involving fewer hand movements. She also said that she had been examined by (Dr. G) and had told him that she had hurt her wrist at the time she had hurt her arm, and that it had hurt "all the way down."

(Ms G), a claims adjuster for Carrier A who took over claimant's file in May 1993, testified that Carrier A had contested claimant's left thumb injury because in (month, year) claimant told her the thumb problem was "due to movement at work," and because of a report of Dr. S stating the thumb problem was due to repetitious work. She also said claimant told her the problem was "a muscle right above her thumb." Ms. G agreed that claimant had complained of her thumb before she returned to work on May 17, 1993, and that she got injections for it in March and April 1993.

In an Initial Medical Report of December 18, 1991, (Dr. RO) described the history of the injury as claimant's reaching across the table, picking up a panel, and throwing it, and

the muscle in the back of her elbow going into a spasm leaving claimant unable to straighten her arm. Dr. RO diagnosed "sprain & strain, elbow & forearm, unspecified." In his initial medical report of January 6, 1992, (Dr. DO) diagnosed "elbow; lateral epicondylitis." In his October 9, 1992, report, Dr. DO noted that claimant's symptoms appeared to be under control but noted "some localized tenderness over the lateral epicondyle exacerbated with dorsiflexion of wrist."

On December 7, 1992, claimant began treating with Dr. S complaining of pain, numbness and weakness in her left forearm with limitation of extension of her left wrist. On March 1, 1993, Dr. S performed surgery on claimant's left elbow to release the posterior interosseous nerve.

In a letter dated July 12, 1993, Dr. S stated that claimant's "problem with her thumb is related to the injury that she had sustained in (month year)," and, further, that the problem she was experiencing was "a continuation of the old injury . . . ." In his deposition of October 5, 1993, Dr. S stated that his initial diagnosis was tendinitis involving the extensor group of muscles and tendons that go through the first dorsal compartment in the wrist. He also stated that his current diagnosis was "Dequervaines Tenosynovitis involving the extensor tendons in the first dorsal compartment," a condition he said was fairly common in patients whose work involves repetitious movements of the thumb and wrist which can cause inflammation of the tendons of that area. While Dr. S also stated that the pain and discomfort in claimant's left wrist and the tenderness along the first dorsal compartment was probably due to the repetitious movement of her thumb and wrist at work, he also said that claimant was exhibiting this pain and discomfort in her entire upper left extremity at the time of her first visit, that it became more pronounced, and that she brought it to his attention on March 29th and received steroid injections then and on April 26, 1993. He also stated that claimant had manifested signs and symptoms even before he released her to return to work, and that although she had a "flare up of symptoms after she returned to work," it was his opinion that "the Tenosynovitis of the first dorsal compartment had existed as early as March of 1993."

On August 18, 1993, the Texas Workers' Compensation Commission (Commission) requested that (Dr. G) examine claimant "to determine whether [claimant's] left hand problems are related to her original injury of (date of injury), or whether she has a separate problem." In an unsigned report of his September 7th examination, Dr. G diagnosed "chronic stenosing tenosynovitis of the thumb conjoint tendons at the left wrist radial styloid region (deQuervain's syndrome)," and stated it was consistent with having been caused by overuse in her job as a machine operator. In his opinion, Dr. G felt claimant had two problems, first, a posterior interosseous nerve injury to the left elbow and proximal forearm resulting from her (date of injury), injury, and second, a deQuervain's syndrome "due to an overuse syndrome at work occurring in (date)," with the onset of the new injury occurring as she was completing her recovery from her other "unrelated problem."

We are satisfied the evidence is sufficient to support the hearing officer's determinations that claimant did not sustain a new injury in (month, year) and that her

disability is the result of her (date of injury), injury. To be sure, the medical evidence was in conflict. However, as the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)), it was for the hearing officer to resolve the conflicts and inconsistencies in the evidence including the medical evidence. In accepting Dr. S's opinion, the hearing officer could consider, for example, that Dr. S had treated claimant since early December 1992, including having performed surgery on her left elbow. The hearing officer could also consider the relative likelihood that claimant sustained the deQuervain's syndrome injury at sometime between May 17th when she returned to work following her elbow surgery and June 3rd when she stopped working, as Dr. G opined.

The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust and we do not find them to be so in this case. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

Finally, we find Carrier A's assignment of error respecting the off-record discussion of the hearing officer lacking in merit. Carrier A complains that during a recess just prior to the closing arguments, and while the claimant and the ombudsman assisting her were discussing the closing statement, the hearing officer made certain comments indicating, in effect, that he had already made up his mind as to how he would decide the case. Carrier A first asserts that these comments prejudiced claimant in that they were not translated for her, and secondly that they showed a bias against Carrier A's position and a disregard for the evidence in the hearing record. However, when the parties had completed their closing statements and the hearing officer had advised them of their right to appeal, and immediately before closing the hearing, the hearing officer stated on the record his inclination to rule that claimant did not sustain a new injury in (month, year), since she had not even filed a claim for such an injury. However, the hearing officer went on to state that he would "read thoroughly" the record and exhibits submitted and that his "final decision would be based on all of the evidence that's brought in today." Presumably, these comments were translated for the claimant by the translator at the hearing and, of course, the claimant has not filed a request for review. While the hearing officer's remarks were undoubtedly ill advised, we find no prejudice to Carrier A under the particular circumstances of this case. Nor do we find it necessary in this particular case to remand the case for reconstruction of the record concerning such remarks. However, the Appeals Panel has previously expressed its concern with unrecorded discussions on matters of substance and again reiterates that concern. *See* Texas Workers' Compensation Commission Appeal No.

93762, decided October 1, 1993.

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, the decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge